vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.720 OF 2002

Shri Salim Gulab Pathan
r/o. Jyotibagh, Tal.: Panhala
Dist.:Kolhapur ... Appellant

V/s.

The State of Maharashtra
Through Sangola Police Station
Sangola, Dist.: Solapur ... Respondent

Mr.S.V. Sadavarte for Appellant
Mrs.V.R. Bhosale, APP, for Respondent

CORAM: **S.B. MHASE &**
SMT.NISHITA MHATRE, JJ.

DATED: **FEBRUARY 8, 2007**

ORAL JUDGMENT (PER S.B. MHASE, J.):

. This Appeal is directed against the judgment and order passed by the IV Additional Sessions Judge, Pandharpur on 21.6.2002 in Sessions Case No.120 of 2001 holding the appellant guilty of an offence under section 302 of the Indian Penal Code and imposing a punishment and sentence to suffer rigorous imprisonment for life and to pay a fine of Rs.200/-, in default to suffer rigorous imprisonment for seven days.

2. The deceased Nazabi was the wife of the accused appellant and out of the wedlock they had two children. At the time of the incidence, i.e., on 4.9.2001 the deceased Nazabi alongwith the appellant accused were staying with PW1 Akbar Shaikh. The said PW1 Akbar

Shaikh is the father in law of the appellant and father of the deceased Nazabi. The incident has taken place on 4.9.2001 at about 8 to 8.30 pm at Hatid Shaikh Vasti at Sangola. On the day of incident, according to the prosecution, at about 8 or 8.30 pm, PW1 was sitting outside the house and at that time there were some oral altercations between the accused appellant and the deceased Nazabi. Thereafter the deceased was sitting with her father and the accused appellant gave a call and therefore, the deceased Nazabi went inside the house. The accused locked the door and thereafter they had a quarrel and the accused appellant poured kerosene on the person of the deceased Nazabi and set her on fire. She came out of the house in burning condition. The accused also came behind her and ran away. PW1 Akbar, the father of the deceased, was outside the house who alongwith PW5 and others extinguished the fire. At that time PW3 and PW5 and so also PW6 were present. In the presence of PW3 and PW5, the deceased made a statement on being asked as to how she is put on fire, that the accused appellant set her on fire. Thereafter after giving water to the deceased the deceased was taken to Civil Hospital at Sangli. There the Doctor has recorded the history as per the statement given by the deceased to the extent that the deceased was set on fire by her husband due to the doubt of her character. Thereafter the Doctor has given an information to the police. The police constable recorded the statement of

the deceased being the dying declaration wherein the deceased repeated the same story. On the next day, the deceased expired. After the inquest at Exhibit 6 and the postmortem was carried out and the dead body was handed over to PW1 who carried out the last rituals. The First Information Report at Exhibit 10 was lodged by PW1 Akbar Shaikh and thereafter the matter was investigated and the chargesheet was filed.

3. The learned Counsel appearing for the Appellant submitted that the death of Nazabi is suicidal one since according to him it is Nazabi who has herself set her on fire. The learned Counsel submitted that since last 6 to 7 years, the deceased alongwith the appellant was staying with PW1 who is the father in law of the appellant and father of the deceased and the said fact was not approved by Maula namely the son of PW1 and therefore, Maula was insisting that the deceased and the appellant should not stay with PW1 and on that count there used to be quarrels. According to the learned Counsel on the day of the incident, there was equally a quarrel between Maula and the deceased Nazabi wherein the Maula used a filthy language to the deceased Nazabi and therefore, the deceased has set herself on fire and has committed suicide. On the contrary it is the accused appellant who tried to extinguish the fire and has received injuries to hand and legs. He also submitted that it is Maula who has caused an injury to

the leg of the accused by axe and the accused has lodged a complaint to that effect with the police station and therefore he submitted that the findings recorded by the trial Court that the accused is guilty and responsible for the death of the deceased Nazabi is erroneous. He further submitted that the Sessions Judge committed an error in relying upon the dying declaration recorded by the police constable who is PW6. According to him, the police ought to have made efforts to record the dying declaration through the Magistrate. He further submitted that the dying declaration which is recorded by PW6 and the endorsements which have been made by PW2 Dr.Ugane at Exhibits 13 and 14 are not trustworthy and therefore, the Sessions Judge committed an error in accepting that piece of evidence. The learned Counsel further submitted that the Sessions Judge committed an error in relying upon the depositions of PW1, PW3, PW4 and PW5 because according to him all these prosecution witnesses are close relatives of the deceased and PW1 and therefore, they are interested witnesses. The learned Counsel Mrs.Bhosale, appearing for the State, vehemently opposed the submissions made by the learned Counsel for the appellant. She submitted that the evidence which has been brought on record by the prosecution is cogent and consistent. According to Mrs.Bhosale, the learned Assistant Public Prosecutor, the prosecution has proved the dying declaration of the deceased which has been recorded by the police constable

PW6. She submitted that even though it is recorded by the police constable that was recorded after the police constable had ascertained with the help of the medical officer PW2 that the deceased is in a fit mental condition to make a statement and therefore, it is submitted that such a statement is a reliable statement and can be accepted in evidence. The learned Counsel for the State further submitted that the dying declaration which has been recorded by PW6 is further corroborated by an oral dying declaration it has been deposed by PW1, PW3, PW4 and PW5 and, therefore, according to the learned Counsel for the State, there is no harm in relying upon and accepting and basing the conviction on the basis of dying declaration of the deceased. It is further submitted that the Chemical Analyser report shows that on a burnt piece of the saree and the soil which was recovered from the scene of offence remnants of the kerosene were found and that corroborates with the story of pouring of kerosene on the person of the deceased Nazabi as reflected in the dying declaration and, therefore, the learned Counsel for the State submitted that the prosecution has established the guilt of the accused beyond reasonable doubt and the conviction as recorded by the trial Court is just and proper and requires no interference at the hands of this Court.

4. No doubt that the conviction in the present

matter has been based by the Sessions Court on the dying declaration as is reflected from the evidence of PW6 Laxman and PW2 Dr.Ugane which is further corroborated by an oral dying declaration is deposed to by PW1, PW3, PW4 and PW5. Before we come to the dying declaration we find that the postmortem report which is admitted by the accused shows that the deceased Nazabi had 92% burn injuries and she died because of the burn injuries. Therefore, the cause of death as reflected from the postmortem report also indicate burn injuries. Even according to the accused appellant, the deceased had committed suicide by pouring kerosene on her person and therefore, all this material conclusively prove that the death of the deceased was not a natural one but it has taken place because of the burn injuries. The only question which requires adjudication at the hands of this Court is as to who has caused the burns to the deceased, namely, whether the burn injuries are homicidal one at the hands of the accused appellant and/or whether it is a suicidal one as contended by the appellant accused.

5. PW1 Akbar Shaikh is the father of the deceased and he has stated that the deceased alongwith the appellant was residing with PW1 since last 5 - 6 years and out of the wedlock they had two children. He has also deposed that the accused was carrying business of a tea stall in the village Bhingewadi and was earning

livelihood. He has stated that on the date of the incident PW1 has taken food and was sitting alongwith her father outside. Therefore, because of the call, Nazabi went inside the house. There was some quarrel between them. However, PW1 could not enter because the door was locked. PW1 has further deposed that after some time, the deceased Nazabi came outside the house in a burning condition. The accused also followed her. PW1 stated that with the help of 2-3 persons, the fire was extinguished. At that time he asked the deceased as to how she set on fire and the deceased replied that it is the appellant accused who has set her on fire after pouring the kerosene and he has further stated that thereafter she was taken to the hospital where she succumbed to death on the next day. Even though the suggestions were given to this witness stating that there was a dispute between Nazabi and Maula namely son of PW1. The said suggestion was denied by this witness. This witness has also denied the suggestion given by the defence that on the day of the incident there was a quarrel between Maula and the deceased Nazabi and therefore, the deceased Nazabi set her on fire and thus, on going through the testimony of this witness it appears that his testimony was not affected or was impeached in any way as a result of the cross examination. We find the testimony of this witness is a reliable one and we accept this testimony. Thus, from the evidence of this witness it is established that on

the day of the incident and at the time of the incident the accused appellant was present in the house and that there was some quarrel between the husband and the wife and on that count the accused appellant had set her on fire. It is further to be noted that PW3, PW4 and PW5 are the neighbours who have seen the deceased Nazabi coming out of the house in a burning condition. They were also present when the deceased Nazabi disclosed that the accused appellant have set her on fire and thus, the oral dying declaration which has been deposed to by PW1 is corroborated by the testimony of PW3, PW4 and PW5 and close relatives of PW1. However, their testimony does not suffer from any lacuna or any inconsistency so as to disbelieve these witnesses. Only because they are the relatives cannot be any ground to say that they are interested witnesses so as to disbelieve them. We accept their testimony. Therefore, reading the evidence of PW1, PW3, PW4 and PW5, we find that on the day of the incident and at the time of the incident the accused was very much present there and that it is the accused who has set the deceased on fire. The testimony of PW1 is supported by PW3, PW4 and PW5.

6. Apart from the above referred evidence, it is very important to note that PW2 has deposed that when the patient was admitted at about 3 am on 5.9.2001, he asked the patient the history of the burn injuries and the deceased Nazabi told the Doctor that it is her

husband who has set her on fire because of the doubt of her character. That is reflected in the case paper exhibit 12. Not only that but thereafter PW2 has given an intimation to the police station in respect of burn injuries being received by the deceased Nazabi and therefore, the police constable PW6 has recorded the dying declaration. From the evidence of PW2 and PW6 it is revealed that this statement was immediately recorded at about 4.30 am on 5.9.2001. The police constable PW6 before recording the statement has contacted PW2 Dr.Ugane and had ascertained from the Doctor that the deceased is in full conscious condition to make any statement. PW2 had made an endorsement at Exhibit 13 before the commencement of the dying declaration that the patient is fully conscious and well oriented and is in a condition to give a valid statement. It is further to be noted that after the completion of the statement, the Doctor had again made an endorsement that the patient was fully conscious and oriented and was in a condition to give valid statement throughout the statement. That endorsement is at Exhibit 14. The contents of the dying declaration have been proved by PW6, the police constable. Thus all the prudent formalities in respect of the recording of the dying declaration have been completed by PW6 with the help of PW2. The evidence of these witnesses is not shattered in the cross examination and we have no hesitation in accepting this witness as reliable one and thus, we find

from the contents of the dying declaration and the testimony of PW2 and PW6 that on account of doubt about the character there was an altercation between the deceased Nazabi and the accused appellant and on that count the accused had poured kerosene on the person of the deceased Nazabi and set her on fire. Therefore, we accept the evidence of PW2 and PW6 and the dying declaration. Thus, we find that this evidence of PW1 Akbar Shaikh is corroborated by the evidence of PW3, PW4 and PW5. Not only that but the dying declaration which is recorded by PW2 and PW6 is further corroborated by the evidence of PW1, PW3, PW4 and PW5. It is to be noted that from the scene of offence panchanama Exhibit 6 certain articles namely the burnt pieces of saree, plastic can and kerosene and the soil were recovered by the investigating agencies. The CA report shows that the saree i.e., article 2 and the soil from the scene of offence, article 3 were having the smell and remnants of kerosene. So this evidence also corroborates the rest of the testimony of the witnesses on record. Taking into consideration all this evidence we find that the prosecution has successfully proved the guilt of the accused. The story and the submissions made by the defence and because of the quarrel of the deceased with her brother Maula the deceased had put herself on fire and had committed suicide is a concocted story developed for the purposes of defence only. We do not find any substance in the said submissions. We therefore hold

that the death of the deceased Nazabi was a homicidal death and was caused by the accused appellant and the findings of the guilt recorded by the Sessions Judge is just and proper and no interference is required by this Court. We find that the Appeal is without any merit and substance. We confirm the conviction and the sentence awarded by the Sessions Judge and we dismiss the appeal.

(NISHITA MHATRE, J.) (S.B. MHASE, J.)